No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLEES' REPLY BRIEF.

ARNOLD LEADER,
LEONARD WILSON,
650 South Grand Avenue, Los Angeles 14,
Attorneys for Appellees.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Statement of the Case.

Appellees do not take issue nor materially controvert the Statement of the Case as propounded by Appellant in Appellant's Opening Brief. (Op. Br. pp. 3-4.) Three comments, however, it is believed are required to be made in order to more comprehensively cover and treat said opening statement.

Firstly, Appellees are compelled to state their opinion with regard to the language used by Appellant on page 3 of Appellant's Opening Brief; namely, the language indicating that the Defendant (Appellees) "was apparently . . . dissatisfied with said 'ceiling.'" Appellees contend that there is no room within a purported statement

of the case for argument and Appellant in stating that the Defendant was apparently dissatisfied with said ceiling is propounding a matter of argument.

Secondly, the opening statement as presented in Appellant's Opening Brief, after stating the nature of the action instituted by the Plaintiff (Appellant), merely states that the Defendants filed their Answer thereto, and although reference by page number is made to said Answer Appellees believe it is well to point out herein the fact that said Answer by them filed placed into issue the question of whether the subject premises were in fact offered for rent as housing or dwelling accommodations or used by Appellant as housing or dwelling accommodations.

Thirdly, Appellees believe that it is important to note that the instant case was tried in the District Court only after a prior case had been tried in the Superior Court of the State of California, in and for the County of Los Angeles, between the same parties, being Superior Court case No. 546213. Said cause came on for trial in said court on August 31, 1948. The trial in the instant cause in the District Court came on for hearing on October 12, 1948. The Superior Court action was one in Unlawful Detainer wherein these Appellees were Plaintiff and this Appellant was Defendant. Appellant having refused to pay rent in accordance with the lease [R. 16, Pltf. Ex. 1] and Appellees having demanded rent in conformity with said lease ($350.00 per month) Appellees, after three-day notice to pay rent or quit, brought said action. Appellant by Answer pleaded the Housing and Rent Act in defense asserting that the maximum legal rent was in the

amount of $75.00 per month and denying Appellees' allegations that said premises had been rented for and used for business purposes and, therefore, not within the scope of the rent control acts. Said Superior Court, after trial, found in favor of Appellees; namely, that the subject premises had been offered for rent as, and had been used as, business property. From said decision of said Superior Court Appellant filed her notice of appeal. However, neither the reporter's transcript or briefs in the matter have yet been submitted. The issue, however, it is respectfully submitted, is the identical issue here presented.

Statement of Questions Involved.

Appellees respectfully submit that there is here in fact but a single primary question raised. The question may be succinctly stated as follows: were the subject premises rented and used as housing accommodations under the control of the Office of Price Administration, or its successor, or were they not? It is submitted that a determination of this question, after an application of the facts to the applicable law, is the crux of the instant appeal. Should the foregoing question be answered by this court in the affirmative, the court below was in error. If, however, this Honorable Court resolve the question in the negative, as did the trial court, then the decision below must be affirmed.

It is urged that the statement of questions involved, as raised by Appellant (Op. Br. pp. 5-8), are not in fact the true questions here presented, and that the questions of (1) disregard of Federal regulations, (2) de-control of

housing accommodations, (3) variance of the terms of the written instrument, (4) evasion of Federal regulations, (5) lawful or unlawful use of premises and (6) termination of tenancy of previous tenant for purposes of "de-control" (these being the primary questions stated by Appellant to be here involved) are not in fact the true issues that this court is called upon to determine. The determination of the basic question here involved will in the instant case, as in all other similar cases, depend in large measure upon the facts involved. Thus, inescapably there will be begged the question of whether the evidence adduced does in fact support the Finding of the lower court that the premises here involved were not rented for or used as housing or dwelling accommodations within the meaning of the appropriate federal regulations.

The attention of this court is respectfully directed to the "points on which Appellant intends to rely." [R. 114-117.] That Appellant recognizes the basic issue here involved becomes apparent readily by Appellant's statements contained within the "points on which she intends to rely." [R. 114-117.] Appellant [R. 114] states that the trial court erred in not finding (a) that it was the mutual intention of the parties that the premises were to be used as housing, and (b) that the premises were, therefore, within the control of the rent acts. Appellant, having specified in said "points on which she intends to rely" that said points were the true points involved, should not at this time be heard to otherwise cloud the true issues here involved.

Reply to Alleged Errors, I Through XI.

Appellant urges that the Parol Evidence Rule, when properly applied in the instant case, should preclude the inquiry by the lower court into the intention and contemplation of the parties by them expressed in their negotiations and their conduct with reference to the purpose for which the premises in question were leased and to what use they were put. With this contention, Appellees cannot agree. It is submitted as elementary that the Parol Evidence Rule precludes only the variance or alteration of the terms of a written instrument when said instrument is in fact the integration of the minds of the parties. (See authorities contained in Appellant's Opening Brief at pages 13 and 15 thereof.) It is submitted that there is not in this case involved the problem of the alteration or the variance of the terms of a written instrument. The true question was most logically set forth by Appellant herself in her designation of "points on which she intends to rely" [R. 114-117], and more particularly in subdivisions 1, 2 and 7 thereof. Appellees do not believe that Appellant now seriously contends that the trial court was precluded from taking evidence as to the purpose for which the lease was made (that is, whether for housing or for business purposes) or the use to which said premises were put (that is, whether housing or business purposes), for this is the crux of the case and the real issue as framed by the pleadings.

Also, as a part of Appellant's argument (alleged error No. I, p. 13 of App. Op. Br.), Appellant lays stress on the

question of so-called "lawful or unlawful use." Appellees have at no time contended, nor do they now contend, that the premises here involved were put to an unlawful use by the Appellant.

Appellees do not take serious issue with the statements of law nor the citations thereof as set forth by Appellant with respect to what the law says or how the law has been interpreted in so far as housing and/or dwelling accommodations are concerned because it is the contention of Appellees that the premises here involved were not in the first instance within the scope of said rent regulations. Appellant in her Opening Brief (pp. 16-22) traces historically the development of rent control to the present time with great emphasis on the so-called "Chandler defense." Appellees concede, for purposes hereof, the correctness of said statements of law and history made by Appellant, and further concede that should the trial court have found, or should a correct application of the law and facts be that the premises here involved were "housing and/or dwelling accommodations" within the meaning of the federal statute, then many of the pertinent sections of law cited by Appellant might well be applicable. If, however, the subject premises were in fact and in law not leased nor used as housing and/or dwelling accommodations within the meaning of and as defined in the rent acts (Secs. 201B, 202B and 209A of the Housing and Rent Act of 1947, and said act as amended), then the remaining portions of said rent acts (as cited by Appellant) are inapplicable to the present case.

It is submitted that the remaining portions of Appellant's assignment of errors (alleged errors III through XI) deal with questions of fact. These problems will be treated herein under separate title.

Application of Facts to Law.

The Housing and Rent Act of 1947 and the amendatory statutes of 1948, among other things, provide as follows, to-wit: Section 201B—the restrictions imposed upon rents are upon those rents charged for *rental housing accommodations;* Section 202B—"the term 'housing accommodations' means any building, structure . . . rented or offered for rent for living or dwelling purposes . . ." (See Sec. 209A.)

It is now well established that the housing and rent act was never intended to apply to anything other than premises actually having been offered for rent for and used as premises for dwelling or living purposes. (Housing and Rent Act 201B, 202B and 209A; see *Creedon v. Cohen,* 73 Fed. Supp. 831 (D. C., N. D. Tex., 1947); *Wood v. Whitehouse,* 83 Fed. Supp. 268 (Feb. 22, 1949, W. D. N. Y.).

The pleadings in the instant case having squarely raised the issue as to whether or not the subject premises were offered for rent as housing and/or dwelling accommodations, and the lease in question having referred to said premises and the use to be made thereof as a "guest house or any other lawful purpose" [R. 7], the lower court had before it the duty of determining and inquiring into the contemplated use to which said premises were to have been devoted and the actual use that the Appellant made thereof. [R. 57.] Did the lower court properly apply the facts to the law as hereinbefore stated? Can this Honorable Court now re-try said facts if the Findings of the lower court are substantiated by the facts in evidence as adduced during the trial? It is the opinion of the Appellees that the trial court did properly apply said facts to the law as stated, and that its Findings therefrom are

supported by the facts in evidence as adduced from the testimony.

It is admitted that the evidence adduced is in conflict, but submitted that the preponderance thereof substantiates the position of Appellees. Relevant to the determination of the contemplated use to be made of the premises and the purpose for which it was rented is the testimony of the Appellant that the lease should provide for subletting [R. 67] and that there was to be provision for public liability insurance and that other persons were going to occupy the premises. [R. 58.] Also of importance is the fact that the Appellant is a graduate nurse, and that she had come to learn of the subject premises being for rent through a newspaper advertisement. [R. 60; see Deft. Ex. A, R. 33.] Appellant had been in the business of operating a sanitarium since 1943, taking care of patients as doctors brought them in and advertising in the telephone directory as the Hollyview Sanitarium. [R. 59.] It appears from the evidence that the Appellant, shortly prior to the renting of the subject premises, was a party to a divorce action and that the Hollyview Sanitarium [R. 61] was community property. She discussed the sale of the said sanitarium with the Appellee, W. E. Conrad, or the taking of a loan thereupon for the purpose of purchasing her husband's interest therein. [R. 62-3.]

There was called as a witness for the Appellees a Dr. Westcott. His testimony is highly relevant and probative on the question of the use to which the subject premises were intended to be devoted and the actual use made thereof. His testimony indicates that as a practicing physician he first treated some patents at Appellant's Hollyview Sanitarium [R. 71]; that he had a conversation with the Appellant who informed him that she was obtaining a

divorce and attempting to divest herself of her sanitarium, and that she spoke of removing some patients from the sanitarium to the subject premises; that at least one of these patients was removed from the Hollyview Sanitarium to the subject premises [R. 72], and that she was an aged woman suffering from high blood pressure and strokes and in need of medical care, and that he continued to treat her at the subject premises, and that said patient was incapable of taking care of herself [R. 73]; that he also treated another patient and that his original patient was bed ridden on each of two visits, and that she was under medication and under care pursuant to his direction [R. 74]; further that the Appellant asked him to visit another patient which he did and that he saw other ambulatory patients about the premises, all of whom were elderly, and one of whom was blind. He also testified that the Appellant paid him for his visit to the original patient. [R. 75.]

Another witness (Mrs. Drake) called by the Defendants testified that the Appellant told her that it was a good location for business and that she (the Appellant) could keep a lot of people up stairs, and that she (Mrs. Drake) overheard the Appellee, W. E. Conrad, state to the Appellant that he wanted a professional business woman on the premises. [R. 80.] Mrs. Drake further testified that one patient (previously in the Hollyview Sanitarium) paid $200.00 to the Appellant monthly and another $150.00 per month; further that a nurse from the Hollyview Sanitarium cared for a male patient and the Appellant stated that she was to receive $250.00 per month from said patient. [R. 81.] Mrs. Drake further testified that Appellant administered narcotics and that still another patient paid $150.00 per month [R. 82]; that no

one prepared his own meals, but that meals were in fact on trays placed in the dining room. [R. 83.]

Mr. W. E. Conrad called as a witness on his own behalf testified that he offered the subject premises for rent by advertising the same in certain medical publications and newspapers of general circulation [Deft. Ex. A, R. 86], and that he and the Appellant had a conversation concerning the premises; that she was asked if she could run the premises as a business, and that she answered that patients were furnished to her by a doctor [R. 87]; that he advised her of the zoning details and that the premises had previously been registered and rented as housing, and that there was a rental ceiling on the same as housing, but that he proposed to make the premises a professional building, and that he would accept $350.00 rental as such; that the Appellant had a nurse from the Hollyview Sanitarium inspect the premises. [R. 88.] Mr. Conrad further testified to a conversation between himself and the Appellant to the effect that the premises were to be used for professional purposes and that Appellant asked if Appellee had any objection to a sign on the premises to which he replied that he did not [R. 89]; that Mr. Conrad further testified, in reply to a question by the court, that he displayed a zoning map to Appellant, and that Appellant stated that she would have the foreman from her Hollyview Sanitarium inspect the property before she signed the lease in order to ascertain if the premises were suitable for ambulatory patients. [R. 91.] Mr. Conrad further testified that he and Appellant went into the matter of the conducting of a professional business on the premises thoroughly. [R. 94-95.]

It must be noted at this point, in view of the foregoing testimony, that Appellant in her Opening Brief at page 23

thereof makes the blanket statement that all of the testimony adduced at the trial, including that of the Appellee, Mr. Conrad, indicates that the subject premises were to be used and were used as housing and dwelling accommodations. Appellant fails to cite one reference to the record at this point, and her statement has no foundation whatsoever. It will also please be noted that the testimony hereabove set forth by Appellees refers to the record in each instance and can be substantiated.

Applying the facts and the testimony adduced in the instant case to the applicable law, it is urged that the trial court, having been called upon to determine whether the subject premises were offered for rent and used by the Appellant for the purpose of conducting a business therein, was entirely justified if not compelled to arrive at its finding that the subject premises were at all times contemplated to be used as business property and that after the execution of said lease said premises were in fact used as business property and not as housing or dwelling accommodations within the meaning of the Housing and Rent Act or said act as amended. It is submitted that cases of this character must each be tried and determined, each standing on its own facts; that there can be no hard and fast rule fixed for the determination of whether premises are or are not rented and/or used for business purposes on the one hand or housing on the other. The recent case of *Woods v. Whitehouse,* U. S. District Court, W. N. Y., decided in February of 1949 and reported in 83 Fed. Supp. 270, is illustrative of this last mentioned principle. The issue there presented was stated to be as follows, to-wit: "were the premises housing accommodations under the control of the Office of Price Administration or its successor?" The trial court in attempting to resolve this question announced the following facts to be used in de-

termining said issue: (a) the controlling factor is the predominant use made of the premises; (b) if the premises are not separable, they are to be treated as a unit for the purpose of this determination; (c) if the predominant use of the space is for business purposes, the property is not subject to the control of the rent acts.

In the instant case, it is urged, that the evidence indicates that the use contemplated to have been made of the premises was for the conducting of a business therein, and that it was the contemplation of the parties that the whole thereof was to be used for that purpose. It is further urged that the Court having had ample and abundant evidence before it to sustain its finding that said business use was contemplated by the parties, the said finding cannot now be disturbed.

The court's attention is similarly directed to the case of *Paxson v. Smock,* 73 Fed. Supp. 793, A.D., Pa., September 26, 1947. In this case the court had as its object the determination of the status of some six different premises, and the court there announced that the law had to be applied to the facts of each of the individual premises. The court found that some of the premises were within the control of the rent act, the same having knowingly been leased for housing purposes, and that the others were beyond the scope of the rent act, the same having been knowingly been let for purposes of conducting businesses therein, and this is true although apparently all of the premises involved appeared to have the external appearance of dwelling houses.

Equally interesting and illustrative is the case of *Creedon v. Cohen, supra,* in which the court was called upon to determine whether certain premises were or were not within the control of the rent control act. Said the court,

> "bearing in mind the purpose of the rent control act, and the wording of the act, and such regulations as have been made under it by the Administrator, that are considered valid, it does not seem to me that there is anything in the case to indicate that there was any overcharge for the property as it was leased. It was from the beginning, and is today, a place of business. What I have said I find as facts, and those being the facts, judgment must go for the defendant."

Conclusion.

Appellees' theory of the case is as follows: Appellant being the owner of the Hollyview Sanitarium in Los Angeles and being involved in divorce proceedings and her sanitarium being possibly subject to a disruption sought a re-location for her business and saw Appellee's advertisement in the newspapers. Negotiations were had concerning the desirability of the subject premises for the Appellant, and although the evidence is somewhat conflicting on the actual negotiations and what was said, it seems reasonably clear from the testimony that Appellee, W. E. Conrad, made known to Appellant that he did not desire to lease the premises except for business purposes, and that Appellant made known to Appellee that she was going to conduct a business therein. The lease was executed and sick and aged persons were taken into the premises and were there cared for. The testimony of Mrs. Drake and Dr. Westcott indicates clearly the use to which the premises were put. As it developed, it seems that the Appellant was able to retain her original sanitarium and

shortly after the execution of the lease she no longer had reason to keep the subject premises and sought to escape from the contract she had made by instituting the instant action.

On the facts as presented, two judges have already determined that it was the intention of the Appellant at all times to conduct a business within the subject premises. It is the opinion of Appellees that an exceedingly harsh and unfair result would be attained by permitting a lessee of premises to enter into a lease and then at will prosecute an action for overcharge and seek treble damages in order to escape from the terms of the written instrument.

WHEREFORE, these Appellees pray that the Judgment heretofore made in the instant action be affirmed.

Respectfully submitted,

ARNOLD LEADER,
LEONARD WILSON,
Attorneys for Appellees.